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No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. AND IAN HAMILTON,

Petitioners,

vs.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit, in granting a preliminary injunction, correctly applied principles of copyright law most recently set forth by this Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)?

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OPINIONS BELOW

In addition to the opinion of the panel of the Court of Appeals denying rehearing (set forth in the Appendix to the Petition*), the parties were advised by notice from the Clerk of the Second Circuit Court of Appeals filed May 28, 1987 (a copy of which is appended to this brief), that the Court of Appeals had denied the suggestion for rehearing *in banc*.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. §106 (1982) (hereinafter the "1976 Copyright Act") provides in pertinent part:

> "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords; . . . "

Section 109(a) of the 1976 Copyright Act, 17 U.S.C. §109(a) (1982), provides that:

> "(a) Notwithstanding the provisions of Section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner to sell or otherwise dispose of the possession of that copy or phonorecord."

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* The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari; "Pet. App." for citation to the Appendix to the Petition; and "A. ____" for citation to the joint appendix in the Court below.

Section 502(a) of the 1976 Copyright Act, 17 U.S.C. §502(a) (1982), provides that:

> "(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of Section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jerome D. Salinger a/k/a J. D. Salinger respectfully opposes this petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit issued in this action on January 29, 1987 granting a preliminary injunction restraining publication of a biography in its present form.

Statement of the Case

Neither the celebrity of respondent J. D. Salinger, nor his well-known desire for privacy, nor invocation of the First

Amendment, can alter the conclusion that this Court should not exercise its discretion to review a decision of the Court of Appeals, which strictly applies this Court's pronouncement in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) ("*Harper & Row*"), on the interplay of the right of first publication and the doctrine of fair use.

Petitioners Random House, Inc. ("Random House") and Ian Hamilton ("Hamilton") have been preliminarily enjoined from publication of a "literary biography" of respondent J. D. Salinger ("Salinger") in its present form, which the Second Circuit found infringed Salinger's copyright in his private, unpublished letters (the "Letters"). This is *not* a case about Hamilton's right to write a biography of Salinger. This is *not* a case about Hamilton's right to use Salinger's Letters as source material for his biography. This is *not* a case about Hamilton's right to report biographical and historical fact he learned from Salinger's Letters. This *is* a case of copyright infringement by reason of a naked taking.

The Court of Appeals, applying the principles set forth in *Harper & Row*, found an extensive taking of Salinger's copyrighted expression, as distinguished from biographical fact, from both a quantitative and qualitative standpoint, by virtue of extensive close paraphrase and, to a lesser extent, verbatim quotation. It therefore held that Salinger's right of first publication outweighed petitioners' claim of fair use, and reversed the decision of the district court as an abuse of discretion. A petition for rehearing, and a suggestion for rehearing *in banc*, were both denied.

Statement of Facts

J. D. Salinger is a well-known author, who wrote and published a number of literary works, all prior to 1965. At issue are 72 letters he wrote from 1939 to 1962, to Judge Learned Hand, Whit Burnett, Elizabeth Murray and others, which have never been published.

In July of 1983, Hamilton wrote Salinger advising that he had been "commissioned" by Random House to write a biography

of Salinger and requesting Salinger's cooperation. A.42, 56. Salinger declined, advising that he preferred not to have such a biography written during his lifetime. A.42, 57. Hamilton proceeded nonetheless.

Hamilton's primary source material for the "literary biography" he subsequently wrote is the Letters. He found most of these Letters in university libraries, where he reviewed them under agreements restricting his right to use and/or quote from them absent permission from *both* Salinger and the libraries, *neither* of which he ever obtained.[1]

Hamilton submitted a manuscript to Random House containing extensive verbatim quotation from the Letters (the "May Galleys"). Salinger learned of this manuscript, objected, and registered the letters for copyright protection. A.18-37, 44. Random House, although it had already distributed review copies, A.46, withdrew the May Galleys from its publication schedule.

Hamilton then apparently reworked the May Galleys with the goal of retaining the same impact – both substantive *and* stylistic – the Letters had in the May Galleys, by merely substituting close paraphrase for direct quotation.[2] His revision (the "Revised Galleys") still uses the Letters to almost exactly the same extent and still contains long expressions of Salinger's private opinions, philosophies, fantasies, criticisms and thought processes, as they were at the time he wrote the Letters, arranged in the same order and pattern as in, and tracking the sequence of, the Letters. A.48.

Hamilton was quite candid in admitting not only that his effort to salvage the May Galleys was difficult ("I will not pretend that this was an easy task") (A.100), but also that, even

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[1] Hamilton *never* attempted to obtain Salinger's permission. A.178-180. None of the libraries ever granted permission, which was requested only *after* the original galleys had been distributed and Salinger demanded their recall. A.183.

[2] Petitioners also use over 200 words of direct quotation, footnoted to a bibliography authored by Jack Sublette (the "Sublette Bibliography"). A.49.

in his own terms, he did not always succeed. When shown a few examples from his book and the Salinger Letters, Hamilton at times conceded that he had in fact adopted Salinger's expressions. He explained that Salinger is "a very contagious writer. His tone is infectious. His turns of phrases are memorable and hard to dislodge from the mind." A.925(b). Alternately, Hamilton argued that he was reporting "fact", when questioned about things that could, under no circumstances, be regarded as fact. When asked why he aped Salinger's initial capitalizations of certain words, he said that he copied only to convey Salinger's tone, one of irony. When asked why he couldn't have flatly stated that Salinger said something in an ironic tone, Hamilton responded pretentiously "that would make a pedestrian sentence I didn't wish to put my name to." A.925(c). When questioned regarding his adoption of Salinger's unusual metaphor to describe a particular politician, he explained that it was Salinger's "very scornful" view of politicians that he was trying to convey. When asked why he didn't simply state that Salinger was very scornful of politicians, he replied: "that is, again, laborious, pedestrian." A.925(j). Rather than be "laborious" or "pedestrian", Hamilton simply appropriated Salinger's expression.

The Opinion of the Court of Appeals

The decision of the Second Circuit Court of Appeals, written by the Hon. Jon O. Newman, tracked the controlling rules set forth in *Harper & Row*. As Judge Newman stated: "our guidance must now be taken from the decision of the Supreme Court. . . in [*Harper & Row*], the Court's first delineation of the scope of fair use as applied to unpublished works." Pet. App. 9. After summarizing the principles set forth in that case, the Court stated: "[f]ollowing the Supreme Court's approach in *Harper & Row*, we place special emphasis on the unpublished nature of Salinger's letters and proceed to consider each of the four statutory fair use factors." Pet. App. 10.

With regard to the first fair use factor, i.e., the purpose of the use, the Second Circuit agreed with Judge Leval that this factor weighs in petitioners' favor, notwithstanding their profit

motive. Pet. App. 11. However, the Court rejected Judge Leval's exposition of the purported "dilemma" for a biographer considering the opposing poles of quotation (with the attendant risk of infringement), and departure from the copyrighted words (with the attendant risk of distortion). Judge Newman demolished this paper tiger, as follows: "This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction: he has not taken copyrighted material." *Id.* Hamilton, however, did *not* copy only facts and, therefore, finds himself in his present predicament. As the Court of Appeals observed, "the biographer has no inherent right to copy the 'accuracy' or the 'vividness' of the letter writer's expression." *Id.*

The Court also cited Hamilton's testimony that he did not simply report facts because "that would make a pedestrian sentence I did not wish to put my name to." Pet. App. 12. As Judge Newman noted:

> "[W]hen dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a 'pedestrian' sentence. The copier is not at liberty to avoid 'pedestrian' reportage by appropriating his subject's literary devices." *Id.*

The Court then addressed the second fair use factor, the nature of the copyrighted work, giving special weight, as mandated in *Harper & Row*, to the fact that the author's right to control first publication mandates a narrower scope for the application of the fair use doctrine. Nor did the Letters lose their "unpublished" status by virtue of the fact that Hamilton found them in libraries. Pet. App. 12. The Second Circuit therefore concluded that the second statutory fair use factor weighs heavily in Salinger's favor.

With regard to the third factor, the amount and substantiality of the portion used, the Court of Appeals' analysis differed

substantially from that of the district court.[3] Applying the well-settled legal authorities to determine what is paraphrase, the Second Circuit concluded:

> "We have carefully analyzed all 59 of the passages from Hamilton's book cited by Salinger as instances of infringing copying from 44 of his letters. Of these 44 letters, the Hamilton biography copies (with some use of quotation or close paraphrase) protected sequences constituting at least one-third of 17 letters and at least ten percent of 42 letters. These sequences are protected, notwithstanding that they include some reporting of facts and an occasional use of a commonplace word or expression. Hamilton's use of these sequences 'exceeds that necessary to disseminate the facts,' [citing *Harper & Row*, 471 U.S. at 564] . . . The material closely paraphrased frequently exceeds ten lines from a single letter . . . [T]here remains sufficient copying of protected material to constitute a very substantial appropriation." Pet. App. 16.

Not content with a pure quantitative analysis, and once again in keeping with the dictates of *Harper & Row*, the Court of Appeals found that the taking was significant from a qualitative standpoint as well. *Id.* With respect to the copied passages "[t]o a large extent, they make the book worth reading" (*id.*); therefore the Court concluded that the third fair use factor weighs heavily in Salinger's favor.

Applying the fourth factor, the effect on the market for the copyrighted work, the Court noted Salinger's stated present

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[3] Petitioners rely heavily upon Judge Leval's color-coded annotation of the challenged passages of the Book (added to the record, on motion, while the rehearing petition was *sub judice*, in response to the Court of Appeals' reference to certain ambiguities and inconsistencies in Judge Leval's opinion, and prepared at some unspecified time). They neglect to mention that the Court did not rely solely on these ambiguities, expressly stating: "[e]ven if Judge Leval included paraphrases, we conclude that he misapplied the governing standard in determining the number of instances in which Hamilton has used Salinger's copyrighted expression." Pet. App. 14-15.

intent not to publish, and therefore looked to the *potential* market. The Court concluded that some impairment of that market seemed likely, particularly since:

> "The biography copies virtually all of the most interesting passages of the letters, including several highly expressive insights about writing and literary criticism." Pet. App. 17.

Consequently, this factor "weighed slightly in Salinger's favor."

The Second Circuit ruled that Judge Leval had abused his discretion in denying a preliminary injunction, noting that "[m]isapplication of the appropriate legal principles constitutes grounds for overturning the denial or issuance of a preliminary injunction [citations omitted]."* Pet. App. 7. As Judge Newman characterized Judge Leval's erroneous conclusions, they were "[built] on the premise that only . . . fragmentary copying of protected material was involved." Pet. App. 6. As the premise failed, the entire analysis toppled.

Central to the Court of Appeals' analysis, and the major and recurrent failing of this certiorari petition, is the distinction between the preliminary injunction that was issued, restraining publication of the *current version* of Hamilton's biography, and an injunction restraining reporting of the *facts* set forth in the Letters. As the Second Circuit stated:

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* While the district court opinion is couched in the language of "findings," the only "fact-finding" in which it engaged was a comparison of the Letters and the Revised Galleys. The Second Circuit could have considered, but did not consider, the issue of substantial similarity *de novo*, as this issue can be determined by mere comparison on a paper record. *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112 (2d Cir. 1980); *see also Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir. 1976). Similarly, as the "finding" of fair use turns upon legal conclusions drawn from largely undisputed facts, the clearly erroneous standard was inapplicable. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967), *rev'd on other grounds*, 392 U.S. 390 (1968).

> "To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and *Hamilton is entirely free to fashion a biography that reports these facts.* But Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances.' [Citing *Harper & Row*, 471 U.S. at 555.]." (emphasis supplied) Pet. App. 19.

Summary of Argument

In urging the grant of certiorari, petitioners urge this Court to act as a mere review court, at the preliminary injunction stage, and in a case governed by a recent and controlling decision of this Court. There is no justification whatsoever for such an unusual exercise of this Court's discretionary power.

Comparison of the facts here with the facts in *Harper & Row* demonstrates beyond cavil, as the Court of Appeals recognized, that Salinger's right of first publication outweighs Hamilton's claim of fair use under the clear guidelines set forth in *Harper & Row*.

Petitioners' attempts to pose an issue warranting grant of certiorari prove too much. In their efforts to demonstrate that the Second Circuit went beyond the dictates of *Harper & Row*, they grossly exaggerate the Court of Appeals' holding, arguing that the Second Circuit has placed "a nearly absolute prohibition against any quotation at all from unpublished material" (Pet. 13, 9); and, "[t]o the Court of Appeals, 'unpublished' meant 'unquotable' " (Pet. 15). The Court of Appeals' decision simply does not say or even imply *any* of these things.

In their efforts to distinguish *Harper & Row*, petitioners read far too narrowly the clear holding of that case. Under their attenuated reading of the legal principles therein announced, no greater protection would exist for unpublished than published materials. This reading would virtually eliminate the right of first publication and would be directly counter to the *Harper & Row* holding.

Petitioners' efforts to distinguish the facts here from the facts of *Harper & Row* are equally unavailing. They argue that paraphrase (not exclusively verbatim quotation) is involved here, but do not take issue either with the proposition that paraphrase is as protected as is verbatim quotation under the copyright law, or with the Court of Appeals' statement of the settled law to determine what constitutes paraphrase. Petitioners instead quibble with the Court's application of that law to the facts of this case.

Secondly, petitioners argue that the inclusion of some quotes from some of the Letters in a bibliography constitutes a "dissemination" sufficient to distinguish the Letters from President Ford's memoirs at issue in *Harper & Row*, and therefore broaden the permissible scope of fair use. But the *Harper & Row* Court identified the *unpublished* nature of the work as both controlling and "negating" the fair use defense. And both *Harper & Row* and earlier precedent require that any "dissemination" be *authorized* to affect any diminution of rights. The facts here are undisputed that Salinger did not *authorize* any "dissemination." Most importantly, Hamilton conceded that his extensive use of the Letters in his popular biography went far beyond the limited use in the scholarly bibliography, so that any dissemination, even if authorized, would not protect Hamilton's taking.

Finally, petitioners pose the very same First Amendment arguments posed by defendants and rejected in *Harper & Row*, which for the same reasons must be rejected here.

REASONS FOR DENYING THE PETITION

I. This Case Presents the "Ordinary Circumstances" Under *Harper & Row*, in Which the Right of First Publication Outweighs The Claim of Fair Use

Addressing the interplay of the right of first publication[5] and the fair use doctrine[6] in *Harper & Row*, Justice O'Connor stated:

> "Perhaps because the fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works. [citation omitted] . . . This absolute rule, however, was tempered in practice by the equitable nature of the fair use doctrine. . . . *But it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use.'* [citation omitted]. Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works. . . . " 471 U.S. at 551. (emphasis supplied)

> "The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other §106 rights in that only one person can be the first publisher; . . . " *Id.* at 533.

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[5] The exclusive right "to distribute copies . . . of the copyrighted work to the public", including the right of first publication, is the property of the copyright owner. 17 U.S.C. §106.

[6] "Fair use", a common law doctrine which was codified in the 1976 revision of the Copyright Act (17 U.S.C. §107), is an affirmative defense on which petitioners have the burden of proof. *Association of American Medical Colleges v. Mikaelian*, 571 F.Supp. 144, 151 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984).

The Court's position was bolstered by citations to cases stretching back 150 years, including *Folsom v. March*, 9 F. Case. 342 (C.C.D. Mass. 1841), where Justice Story gave early judicial recognition to the fair use doctrine by rejecting it in a case where George Washington's letters formed a substantial part of an allegedly infringing biography.[7]

With the benefit of this historical analysis, the *Harper & Row* Court concluded that although the right of first publication is "expressly made subject to the fair use provision," 471 U.S. at 552, "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Id.* at 555. No showing has been made as to why this case does not present the "ordinary circumstances" referred to, particularly when compared to the facts of *Harper & Row* itself. Witness the following:

Harper & Row	Salinger
Ford's memoirs, although unpublished, were scheduled to be published imminently.	Salinger's Letters are unpublished, and he has no plan or intention to publish them.
Ford's memoirs concern the Nixon pardon—a topic of public concern.	Salinger's Letters are his private expressions of his philosophies, criticisms, and opinions as a young man.

[7] Petitioners take the Court of Appeals to task for failure to reference *Estate of Hemingway v. Random House, Inc.*, 53 Misc.2d 462 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341 (1968). Pet. 12. But, apart from citation for the proposition that an author must voluntarily relinquish his right of first publication, the *Harper & Row* Court made no such reference either. This omission is not surprising given that the *Hemingway* holding applied a fair use analysis to published materials only; although infringement of unpublished letters and oral conversations had been alleged at trial, the court held that letters were used in such a *de minimis* fashion as not to constitute an infringement, and that Hemingway had impliedly consented to defendant's use of the oral conversations. *See* W. Patry, *The Fair Use Privilege in Copyright Law*, 440-41 (1985) ("[R]eliance on *Hemingway* as a decision allowing fair use of unpublished works is inaccurate if not misleading . . . ").

Ford's memoirs describe historical events.	Salinger's Letters describe his feelings and opinions.
Ford's memoirs admittedly include material that was not original and therefore uncopyrightable.	Salinger's Letters are wholly original.
Ford's memoirs were written for public dissemination.	Salinger's Letters were written to friends for their private use.
The *Nation* obtained the manuscript surreptitiously.	Hamilton admittedly violated the agreements under which he obtained the Letters.
At issue in *Harper & Row* were verbatim quotations totalling less than 1 percent of Ford's memoirs.	The Second Circuit found that the biography copied protected sequences constituting at least one-third of 17 of 44 Letters and at least 10 percent of 42 Letters.
The Ford materials constituted 13% of The *Nation* article.	The Second Circuit found that the Letters are quoted or paraphrased on at least 40 percent of the book's 192 pages.

Based upon this analysis, as the Second Circuit found, if the rule in "ordinary circumstances" applied in *Harper & Row*, *a fortiorari*, it must apply here.[8]

Application of each statutory factor supports this result. The first feature severely undercutting defendants' fair use claims in *Harper & Row* was the *character* of their use. 17 U.S.C.

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[8] In the only other reported case involving copyright infringement of unpublished letters since *Harper & Row*, *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985), the court routinely applied the *Harper & Row* precedent to reject the fair use defense.

§107(1). Petitioners here attempt to cloak themselves in notions of "criticism, comment . . . scholarship or research." In *Harper & Row*, the Court noted that "[t]he fact that a publication was commercial as opposed to non-profit is a separate factor that tends to weigh against a finding of fair use. . . . The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." 471 U.S. at 562, citing *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). Certainly petitioners stand to realize significant gain, monetary and otherwise, from publication of this book.

The *Harper & Row* Court also considered "the propriety of the defendant's conduct" in evaluating this factor. There, Victor Navasky, editor of the *Nation*, "knew that his possession of the manuscript was not authorized and that the manuscript must be returned quickly to his 'source' to avoid discovery." *Id.* at 543. Hamilton was likewise aware that copying the language of the Letters without permission was prohibited under the library agreements. A.44-45. Navasky and Hamilton stand on equal footing under this test.

As to the second factor, *i.e.*, the nature of the copyrighted work, 17 U.S.C. §107(2), the manuscript in *Harper & Row* was intended for public dissemination, as opposed to Salinger's private correspondence intended to be read only by its addressees. Petitioners' arguments to the contrary notwithstanding, the fact that these letters were *not intended* for publication renders far more compelling the need for protection of what this Court has termed the "editorial" interest underlying the right of first publication. When considering a work intended for publication, the creative process leading to a work which the author deems ready for publication has been invaded before completion; when considering a work *not* intended for publication, by definition, that creative process has not even

begun.[9] Therefore, the nature of the copyrighted works here — brief, unpublished, and private letters — is a compelling factor *against* a finding of fair use.

As to "the amount and substantiality of the portion used", 17 U.S.C. §107(3), to term Hamilton's use of the Letters "incidental," as do petitioners (Pet. 19), is hardly fair play: quotation or paraphrase on at least 40% of the pages of their book can by no stretch of the imagination be termed "incidental". Moreover, the number of words actually used is not determinative; critical to this Court's analysis in *Harper & Row* was the conclusion that "the *Nation* took what was essentially the heart of the book." *Id.* at 564-65. Hamilton, like the *Nation*, excerpted "subjective descriptions and portraits," ranging in Salinger's case from his theory of the correct portrayal of Hamlet to his thoughts on patriotism. A.880, 890. The endorsement of a qualitative measure of "substantiality" is, therefore, equally applicable here, particularly given the brevity of each Letter.

The fourth factor — "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. §107(4) — is of peculiar application where the copyright owner currently intends *not* to publish. As noted by the Court below, the fact that Salinger has no present intention to publish is irrelevant, as the inquiry addresses the *potential* market. *See Harper & Row*, 471 U.S. at 568; *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Pacific and Southern Co., Inc. v. Duncan*, 744 F.2d 1490, 1496-97 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Also, to the extent the right of first publication is unique and can be exercised only once, should Salinger's heirs later decide to publish, the value of the Letters would be substantially diminished. For this reason, this Court created a *presumption* of harm, *Sony Corp.*, *supra*, 464 U.S. at 451, which governs here.

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[9] As petitioners themselves concede, "[l]etters are written . . . for the purpose of communicating" (Pet. 19), *not* for the purpose of publication and its attendant results, both critical and financial.

II. There is No Basis for Distinguishing Harper & Row Here

Petitioners' specific attempts to present circumstances not controlled by *Harper & Row* consist of the following arguments: (1) paraphrase and not verbatim quotation is involved here; (2) there has been some alleged "dissemination" of the Letters; and (3) this preliminary injunction is an impermissible prior restraint on publication of a biography. Each argument is addressed briefly below.

A. *Hamilton Has No Right to Avoid "Pedestrian Reportage" At Salinger's Expense*

Hamilton's extensive paraphrasing of the Letters is as abhorrent under the copyright law as is direct quotation. That rule of law is clear and settled. Nor is there any conflict among the Circuits as to the legal definition of "paraphrase." Petitioners do not take issue with the Court of Appeals' statement of the law; they contest only the application of these clear legal principles to the narrow facts of this case, and strain to do so, at that.[10]

That "copyright protection is not limited to literal reproduction" cannot be contested. 1 M. Nimmer, *Nimmer on Copyright* (hereinafter "Nimmer") §13.03[A] at 13-21. "The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity." *Id.* at 13-20.1. Judge Learned Hand (one of the recipients of the Letters) said: "the copyright covers not only the actual sequence of words used, but any equivalent expression which gives substantially the same impression to the mind as the author's words." *Myers v.*

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[10] Petitioners test the outer bounds of advocacy in attacking the Court of Appeals' view of paraphrase (Pet. 17), citing only to a single example selected to demonstrate how "inadequately Hamilton's paraphrasing has rendered Salinger's chosen form of expression," Pet. App. 18 and n.5.

Mail Express Co., 36 C. O. Bull. 478, 480 (S.D.N.Y. 1919)."[11] In *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), on which the Court below relied, the Second Circuit found impermissible paraphrase in "similarity and copying of the association, presentation, and combination of the ideas and thoughts which go to make up the appellees' literary composition."

The long and the short answer as to whether petitioners have impermissibly paraphrased Salinger's Letters is found in the text comparison (A. 839-93), for as Justice Potter Stewart said of obscenity, "I know it when I see it." Hamilton's slavish adherence to Salinger's choice of situations and emphasis clearly satisfies the Second Circuit's formulation of infringing paraphrase in *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), as follows:

> "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments. Thus, the essence of infringement lies not in taking a general theme . . . but in appropriating the 'particular expressions through similarities of treatment, details, scenes, events and

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[11] The *Harper & Row* dissent summarized the relevant standard as follows:

> "[T]he inquiry proceeds along two axes: *how closely* has the second author tracked the first author's particular language and structure of presentation; and *how much* of the first author's language and structure has the second author appropriated [footnote omitted]." 471 U.S. at 583.

See also Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F.Supp. 686, 690 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *Davis v. E.I. du Pont de Nemours & Co.*, 240 F.Supp. 612, 621 (S.D.N.Y. 1965).

> characterization,' [citation omitted]. In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source."[12]

Hamilton's use of "virtually all of the most interesting passages of the letters including several highly expressive insights" (Pet. App. 17) must be seen as an appropriation far in excess of "that necessary to disseminate the facts" (*Harper & Row*, 471 U.S. at 564).

B. *Salinger Has Not Forfeited His Right of First Publication*

Petitioners label the Letters "technically" unpublished, non-specifically referring to earlier purported "disseminations" of the Letters (or parts thereof), which, they argue, serve to "weaken" or eliminate Salinger's right of first publication and/or expand the scope of permissible use.[13] This argument appears primarily based upon the inclusion of brief quotation and synopses of certain Letters to Whit Burnett, without Salinger's permission, in the Sublette Bibliography.

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[12] As also stated in *Iowa State University v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980), where defendant claimed that "it was engaged in the laudable pursuit of disseminating the life history of an important public figure":

> "This argument proves too much. ABC possessed an unfettered right to use any factual information revealed in *Champion* for the purpose of enlightening its audience . . . [citation omitted], but it can claim no need to 'bodily appropriate' Iowa's 'expression' of that information by utilizing portions of the actual film . . . [citation omitted] . . . . "

[13] Petitioners cannot seriously contend that the fact that the original Letters are housed at university libraries vitiates Salinger's right of first publication. *See* 17 U.S.C. § 109(a), governing distribution of single copies of a work, which has been explained as follows: "[a] library which owns a copy of a work may lend such copy to its patrons without infringing the copyright owner's distribution right" (Nimmer, § 8.12[B] at 8-120), but those who then examine that letter may *not* in turn copy and publish it (*id.*, §5.04 at 5-33), as petitioners did here.

The undisputed facts are that Salinger has not published any of the Letters, nor has he licensed their use by any other party, including Sublette. A.53. Immediately upon learning of Sublette's unauthorized use from citation of this bibliography in the Revised Galleys, Salinger advised Sublette and his publisher of his exclusive rights to the Letters. A.49, 81-82. Thus, Sublette's digests and quotations from the Letters cannot either be considered a kind of "pre-emptive" first publication or operate as an estoppel. *See* Nimmer, §13.07 at 13-134.

To argue that this "dissemination" somehow justifies their conduct, petitioners isolate the following language in *Harper & Row*: "[i]n a given case, factors such as implied consent through *de facto* publication on performance or dissemination of a work may tip the balance of equities in favor of pre-publication use." Pet. 13. On the basis of this sentence, picked out of context, they argue that Sublette's unauthorized "publication" constitutes a "dissemination" sufficient to tip the balance in this case. But petitioners ignore that the very next sentence in this Court's decision reads "[b]ut it has never been seriously disputed that 'the fact that the plaintiff's work is *unpublished* . . . is a factor tending to negate the defense of fair use' [citing Nimmer]," with no reference whatsoever to dissemination.

Obviously, any letter mailed is "disseminated," in some sense, to its addressee. Following petitioner's selective reading of *Harper & Row* to its logical conclusion, in the case of *all letters* mailed, this "dissemination" would tip the balance in favor of pre-publication use. This *cannot* be a correct reading of *Harper & Row*, given the language in that decision, relied on by the Court of Appeals, as follows:

> "This argument [that fair use could permissibly be made of Ford's unpublished memoirs because imminent publication demonstrates no interest in non-publication] *assumes that the unpublished nature* of the copyrighted material *is only relevant to letters* or other confidential writings *not intended for dissemination*." 471 U.S. at 554 (emphasis supplied).

As the Court of Appeals concluded:

> "Pertinent to our case is the fact that the Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying." Pet. App. 10.

The *Harper & Row* Court also specifically focused on the requirement of *authorization* of the dissemination: "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's [right of first publication]." 471 U.S. at 551. Petitioners do not and cannot contend that Salinger *authorized* Sublette's use. This fundamental requirement of authorization derives from common law copyright.[14] As stated by a leading 19th-century commentator:

> "The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights. . . . He may admit one or more persons to its use, to the exclusion of all others; and in doing so, he may restrict the uses which shall be made of it." Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* 102-03 (1879) (hereinafter "Drone").[15]

Thus, "although an author's intent will not be given controlling weight against the effect of his acts, nevertheless *the acts which constitute publication must be voluntary* and not performed under compulsion." Nimmer, §4.13[D] at 4-75 (emphasis supplied). *See also Dowdey v. Phoenix Films, Inc.*, 199 U.S.P.Q. 579, 582 n.10 (S.D.N.Y. 1978).

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[14] *See Palmer v. DeWitt*, 47 N.Y. 532 (1872), cited with approval in *Ferris v. Frohman*, 223 U.S. 426, 434 (1912); *Stanley v. CBS*, 35 Cal. 2d 653, 221 P.2d 73, 78 (1950); *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P.2d 546, 552 (1959).

[15] These principles have consistently been applied to letters. *See* Drone, *supra* at 105, 127 citing *Thompson v. Stanhope*, Amb. 737 (1774). That letter writers retain control over first publication, regardless of unauthorized release after transmission "was judicially recognized as early as 1741, when Curl, the London bookseller, was enjoined from selling a volume containing the private correspondence of Pope and Swift . . . " *Id.* 127-28.

Finally and most critically, the Sublette Bibliography cannot shield Hamilton's use because the nature of Hamilton's "taking" is substantially different from the "taking" in the Sublette Bibliography, as Hamilton himself readily conceded. A.198. While both are unauthorized, the extent of the dissemination of the Letters in a popular biography will far outdistance the limited dissemination of a scholarly bibliography. And Hamilton readily admitted that while his *quotation* of Salinger in the Revised Galleys is limited to those materials quoted in Sublette, his *use* of the Letters (including his paraphrase) goes far beyond Sublette's use. A.199.

C. *Petitioners' Myopic View of the First Amendment*

In a further effort to transform this case into something other than a four-corner application of the *Harper & Row* principles and to avoid the "pedestrian reportage" Hamilton so loathes, petitioners decry a "direct collision" with First Amendment values if this Court permits "the use of copyright in this case to suppress speech." Pet. 15, 21. The preliminary injunction here is in no sense infirm simply because it restrains "expression."[16] The First Amendment protects the *right* to speak (and the right *not* to speak). The copyright law protects the *form* of speech, whether published or unpublished. These protections are not mutually exclusive. This case presents no more than a garden-variety application of the balance traditionally drawn between copyright and free speech interests, as petitioners themselves concede ("prior restraints in copyright have been routinely issued on a finding of liability" [Pet. 20]).

The co-existence of the First Amendment protection of free speech and the copyright law provisions preventing usurpation of intellectual property is grounded in the "idea/expression dichotomy," *i.e.*, while copyright may not be claimed in an idea,

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[16] "The Copyright Act specifically authorizes a federal court to 'grant temporary and final injunctions . . . ' 17 U.S.C. §502(a). Preliminary injunctions are a common judicial response to the imminent infringement of an apparently valid copyright." *Dallas Cowboys Cheerleaders, Inc. v. Scorecard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979).

it may be claimed in an author's original *expression* of an idea. That dichotomy has for decades been regarded by courts and commentators as "an acceptable definitional balance." Nimmer, §1.10[B] at 1-76, 1-77; *accord, Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

In *Harper & Row*, this Court "for the first time explicitly considered competing copyright and First Amendment rights" (Nimmer, §1.10[B] at 1-78.1) and endorsed this idea/expression dichotomy as a mechanism "permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556. Acknowledging that "the Framers intended copyright itself to be the engine of free expression", the Court held that the protection of free speech required by the First Amendment was "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable fact and ideas." *Id.* at 558-59.

That "First Amendment values" require an exception to the "ordinary circumstances" rule was expressly argued and rejected in *Harper & Row*. Respondents there argued that "their copying of Mr. Ford's expression [is] essential to reporting the news story"; "not only the facts contained in Mr. Ford's memoirs, 'but the precise manner in which [he] expressed himself was as newsworthy as what he had to say' [citation omitted]." *Id.* at 556. The Court flatly rejected this argument: "[t]he fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." *Id.* at 557.

While acknowledging the "routine" issuance of injunctions upon a finding of copyright infringement, petitioners protest this particular routine application, intoning that prior restraints have been held to be "the least tolerable infringement on First Amendment rights." Pet. 20. Petitioners' citation (*id.*) to the "Pentagon Papers" case, *New York Times Co. v. United States*, 403 U.S. 713 (1971) to buttress this argument, fails to point out that copyright was not at issue there. To the contrary, two of the

concurrences specifically identified copyright as one of the areas in which prior restraints pass constitutional muster:

> "[C]opyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed." 403 U.S. at 726 n. (Brennan, J., concurring).
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> * * *
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> "The Congress has authorized a strain of prior restraints against private parties in certain instances. . . . Article I, §8, of the Constitution authorizes Congress to secure the 'exclusive right' of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another [citations omitted]". *Id.* at 732 n.1 (White, J., concurring).

The above statements are in accord with Nimmer's conclusion that, in the area of copyright, *both* parties to a controversy are articulating a right to voluntary self-expression; when infringement is found, the balance must tip toward plaintiff, since "[o]ne who pirates the expression of another is not engaging in *self*-expression in any meaningful sense." Nimmer, §1.10[B] at 1-76.

Not only does the First Amendment neither grant Hamilton a license to pirate expression nor insulate him from an injunction against doing so, but because the Letters are unpublished, petitioners can hardly lay sole claim to First Amendment protection.[17] Salinger's interest in controlling first publication and

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[17] Particularly where plaintiff's work is *unpublished*, courts have never found the potential damage outweighed by defendant's commercial interests. In *Birnbaum v. U.S.*, 588 F.2d 319, 326 (2d Cir. 1978), the Second Circuit held: "[T]he common law copyright [in private Letters] is, in essence, *a right of first publication* [citations omitted] *which of necessity includes the right to suppress any publication by injunction.*" (emphasis added). *See also, Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043, 1064 (S.D.N.Y. 1971); *In re Ryan's Estate*, 188 N.Y.S. 387, 389 (Surrogate's Ct. N.Y. Co. 1921).

his corresponding right *not* to publish, themselves pose potent First Amendment concerns. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 778 (1968), upon which petitioners rely, explicates this principle:

> "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

See also Harper & Row, supra, 471 U.S. at 559 (citing above passage from *Hemingway* with approval); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("The First Amendment interests . . . are not based upon a desire for pecuniary gain, but upon the author's freedom to speak or remain silent as an end in itself"); Nimmer, §13.05[A] at 13-74.

Petitioners' attempted equation of their own (substantially commercial) interests with the public interest is, therefore, misleading. First, petitioners' claim to a monopoly on the public interest is singularly myopic as it suggests that publishers are the only ones entitled to seek the mantle of First Amendment protection and ignores altogether Salinger's constitutional and statutory right to speak when — and if — he chooses. Abrogation of this right cannot be redressed by money damages. To circumvent the presumption of irreparable injury that arises as the result, petitioners resort to arguing that Salinger's motivation is suspect, *i.e.*, that his true interest in asserting his rights is one of privacy, rather than copyright. But *Harper & Row* makes clear that the right of first publication protects several distinct interests, including a privacy interest.

Second, although petitioners wax eloquent on the public's interest in the knowledge to be gained from biographies, they ignore the equally important public interest in safeguarding the

free flow of information available to scholars and libraries. If Hamilton's cavalier disregard for the unambiguous terms of the library agreements that permitted him access to the Letters is sanctioned, there will be a chilling effect upon those who have made -- or might consider making -- private correspondence available to libraries and scholars, with express conditions on access to and the right to use such documents.

The Court of Appeals' opinion makes clear that what petitioners have taken from Salinger's Letters is *not ideas*. What petitioners have taken is *not fact*. What they have taken is Salinger's *original expression*. The injunction does not prevent Hamilton from learning or reporting about Salinger's life; it restrains Hamilton from excessive use of Salinger's own words to describe it, and should cause no more of a "direct collision" with the First Amendment than has been experienced in myriad earlier cases. Contrary to petitioners' dire prediction, *i.e.*, ("[t]he decision of the Court of Appeals imperils the writing of all biography" [Pet. 11]), no real "threat" exists to either biography or historical scholarship, as no injunction against dissemination of fact -- historical or otherwise -- has been issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August 28, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the united [sic] States Court of appeals [sic], in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of May one thousand nine hundred and eighty-seven.

JEROME D. SALINGER a/k/a J.D. SALINGER

Plaintiff-Appellant.

v 86-7957

RANDOM HOUSE, INC., and IAN HAMILTON

Defendants-Appellees.

A petition for rehearing filed herein by counsel for the appellees Random House, inc [sic] and Hamilton [sic] and the panel that heard the appeal having denied said petition for rehearing in a published signed opinion filed May 4, 1987.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk